

No. 14567

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United States  
Court of Appeals  
for the Ninth Circuit.

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JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY  
CANNERIES, INC., and D. K. MacDONALD  
& CO.,

Appellees.

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Transcript of Record

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Appeal from the District Court  
for the District of Alaska,  
Division Number One.

FILED

JAN 26 1955

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

JOHN H. DIMOND,

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Juneau, Alaska,

For Appellant.

FAULKNER, BANFIELD & BOOCHEVER, By

R. BOOCHEVER,

P. O. Box 1121,

Juneau, Alaska,

For Appellee, Halferty Canneries, Inc.,  
et al.

J. GERALD WILLIAMS,

Attorney General for Alaska,

Juneau, Alaska,

For Appellee, Alaska Industrial  
Board.





In the District Court for the District of Alaska,  
Division Number One, at Juneau

Civil Action No. 6983-A

JOHN GISKE,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY  
CANNERIES, INC., and D. K. MacDONALD  
& CO.,

Defendants.

### STIPULATION OF FACTS

Be it remembered that the following agreed statement of record on appeal in the entitled cause was filed in the office of Clerk of the District Court for the District of Alaska, First Judicial Division, at Juneau, Alaska, on the 20th day of October, 1954.

#### Agreed Statement

The relevant facts in this case are these:

1. Plaintiff was employed by defendant, Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, as a net boss in defendant's salmon cannery. In such employment his earnings totalled \$2,292.59, or an average of approximately \$17.63 per day. On September 3, 1952, while in the course of such employment, plaintiff twisted and cut his right leg. He left such employment on September 27, 1952, and was tempo-

rarily disabled by reason of such injury from September 27, 1952, to December 31, 1952.

2. Plaintiff is approximately 68 years old and is a resident of the State of Washington. Since about 1926 he had been employed each year in Alaska during the fishing season by defendant Halferty Canneries, Inc. He was so employed as a fisherman from 1926 to 1945, as a net and webb man in the net loft of defendant's cannery, from 1941 to 1951, and as net boss during the seasons 1951 and 1952. During the "off season," that is, the period of the year outside the regular fishing season in Alaska, he generally undertook employment in Seattle, Washington, repairing nets.

3. Plaintiff's record of earnings and employment for the years 1948 to 1952 is as follows:

(a) During the years 1948 to 1951, plaintiff's earnings during the seven-month "off season" outside of Alaska were as follows: 1948—\$288; 1949—\$648; 1950—\$399.60; 1951—none.

(b) While employed by defendant Halferty Canneries, Inc., at Cordova, Alaska, during the year 1951, he earned a total of \$2,540.00.

(c) While employed by defendant Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, he earned a total of \$2,292.59, or an average of \$17.63 per day.

4. Defendants paid plaintiff, in respect to such injury, pursuant to the provisions of the Alaska Workmen's Compensation Act, the following:

(a) All medical expenses.

(b) The sum of \$90.35 for temporary disability compensation, computed at the rate of \$1.39 per day from September 28, 1952, to November 30, 1952.

5. Defendant's computation of the amount of temporary disability compensation paid (\$90.35) was grounded upon their view that plaintiff's "average daily wage earning capacity," within the meaning of Section 43-3-1 ACLA 1949, was \$1.39 per day—this figure apparently being based upon plaintiff's average earnings outside of Alaska after the end of the fishing season for prior years. Plaintiff was not satisfied with this—his contention being that he ought to have received compensation based upon a higher average wage earning capacity, as measured, for example, by his earnings while working for the defendant, Halferty Canneries, Inc., at the time of injury, or by the average of his yearly earnings while working for such employer in prior years. Hence, on June 22, 1953, plaintiff filed with the Alaska Industrial Board his application for adjustment of claim.

6. This application was heard first by less than the full Industrial Board and on August 13, 1953, the Board Chairman, Henry A. Benson, rendered his decision holding that plaintiff had been temporarily disabled by reason of his injury during the period September 27, 1952, to December 31, 1952, and that his average daily wage earning capacity for that period was \$7.05 per day. Defendants

made application to the full Board for review of this decision, and on January 8, 1954, the full Board set aside Benson's decision of August 13, 1953, and awarded plaintiff temporary disability compensation from September 27, 1952, to December 31, 1952, on the basis of an average wage earning capacity of \$3.88 per day.

7. From this decision of the Board the matter was appealed by plaintiff to the District Court on January 29, 1954, pursuant to the provisions of Section 43-3-22 ACLA 1949; and on July 29, 1954, the District Court, without opinion, entered its findings of fact, conclusions of law and decree affirming the decision of the Alaska Industrial Board of January 8, 1954. Plaintiff filed his notice of appeal from such decree to the United States Court of Appeals for the Ninth Circuit on August 12, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General of Alaska;

By /s/ EDMUND A. MERDES,  
Assistant Attorney General, Attorney for Defendant-Appellee, Alaska Industrial Board.

Approved: Oct. 23, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed October 20, 1954.

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Alaska Industrial Board  
Juneau, Alaska  
Case No. 2-9-331  
Docket No. 217

JOHN GISKE,

Applicant,

vs.

HALFERTY CANNERIES, INC., and/or D. K.  
MacDONALD & CO.,

Defendants.

### DECISION

This case came on to be heard by the Full Board pursuant to the appeal of defendant from the Board Decision of August 13, 1953, made by Members Henry A. Benson and Neil F. Moore. Applicant was represented by attorney William L. Paul, Jr., and defendant by attorney Robert Boochever of counsel Faulkner, Banfield and Boochever. The Full Board heard argument of counsel and considered the case on the merits.

### Decision

The Decision in this matter made on August 13, 1953, is set aside and applicant is awarded compen-

sation for temporary total disability from September 27, 1952, to December 31, 1952, inclusive. The average daily wage earning capacity is hereby fixed at \$3.88.

January 8, 1954.

[Seal]        /s/ NEIL F. MOORE,  
Member.

/s/ J. GERALD WILLIAMS,  
Member.

### Certification

I hereby certify the above and foregoing to be a full, true and correct copy of the Decision in the case of John Giske v. Halferty Canneries, Inc., and/or D. K. MacDonald & Co., Case 2-9-331, Docket No. 217.

January 8, 1954.

[Seal]        /s/ HENRY A. BENSON.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter, coming on to be heard before the court on the complaint and appeal filed by the plaintiff, and the plaintiff having been represented by W. L. Paul, Jr., and John Dimond, and the defendants Halferty Canneries, Inc., and D. K. Mac-



Donald & Co., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, and the attorneys for the plaintiff and defendants having entered into an oral stipulation that the principle involved in this case be governed by this court's decision in the case of *Elmer W. Brown v. Alaska Industrial Board and Alaska Aggregate Corp.*, and *Morrell P. Totten & Company, Inc.*, No. 6981-A, and good cause having been shown, the court makes the following

### Findings of Fact

1. That on or about September 3, 1952, John Giske twisted and cut his right leg while employed by the defendant Halferty Canneries, Inc., at Cordova, Alaska.

2. Applicant was paid full wages to the end of the fishing season and was temporarily disabled thereafter from September 27, 1952, to December 31, 1952, inclusive.

3. While employed by Halferty Canneries Inc., plaintiff received wages of \$2,292.59 for the period May 18, 1952, to September 27, 1952.

4. When not employed during the fishing season in Alaska, applicant customarily was employed as a net repairman in Seattle, and his earnings during the off-season for the four years prior to 1952 were

as follows: 1948, \$288.00; 1949, \$648.00; 1950, \$399.60; 1951, none.

5. On the basis of a seven-month off-season, applicant's average monthly wage, based on the three last years during which he worked in the off-season, was \$63.60, and his average daily wage was \$2.12 per day.

6. The Alaska Industrial Board entered its decision and award on January 8, 1954, allowing applicant compensation for the period September 27, 1952, to December 31, 1952, inclusive, based on an average daily wage of \$3.88 per day.

7. The award of the Alaska Industrial Board adequately compensated applicant for loss of earnings sustained by reason of his injury.

8. The defendant employer and insurance company have made no cross appeal for a reduction of the average daily wage basis from \$3.88 to \$2.12 per day.

From the foregoing Findings of Fact, the court makes the following

### Conclusions of Law

1. There was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining employee's average daily wage during the period of his disability to be \$3.88.

2. The decision of the Alaska Industrial Board



should be affirmed and defendants should have judgment against the plaintiff for their costs and disbursements, including a reasonable attorney's fee of \$.....

Done in Open Court this 29th day of July, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

Approved as to form:

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

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In the District Court for the District of Alaska,  
Division Number One, at Juneau  
Civil Action File No. 6983-A

JOHN GISKE,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD and HAL-  
FERTY CANNERIES, INC., and D. K. Mac-  
DONALD & CO.,

Defendants.

DECREE

This Matter, having come on to be heard before the court on the complaint and appeal filed by the

plaintiff, the plaintiff having been represented by W. L. Paul, Jr., and John Dimond, and the defendants Halferty Canneries, Inc., and D. K. MacDonald & Co., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, the attorneys for plaintiff and defendants having entered into an oral stipulation that the principle involved in this case be governed by this court's decision in the case of Elmer W. Brown v. Alaska Industrial Board and Alaska Aggregate Corp., and Morrell P. Totten & Company, Inc., and the court having entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Alaska Industrial Board dated January 8, 1954, be and the same is hereby affirmed, and defendants are awarded judgment against the plaintiff for their costs and disbursements, including an attorney's fee of \$. . . . .

Done in Open Court this 29th day of July, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

Approved as to form:

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 29th day of July, 1954.

Dated August 10, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

[Endorsed]: Filed August 12, 1954.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, John Giske, as principal, and Indemnity Insurance Company of North America, a corporation, as surety, are held and firmly bound unto Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, as defendants, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, 1954.

Whereas, on July 29, 1954, in an action pending in the District Court of the United States for the Territory of Alaska, 1st Division, between John Giske, as plaintiff, and Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, defendants, an order granting a motion to dismiss was entered against the said John Giske, and the said John Giske having filed in said Court a notice of appeal from such order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said John Giske shall prosecute his appeal to effect, and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said John Giske, if the judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

JOHN GISKE,

By /s/ JOHN H. DIMOND,

Of His Attorney, Principal.

[Seal] INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA,

By /s/ HENRY R. BUCK,

Attorney-in-Fact, Surety.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

STIPULATION

Whereas, notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above cause was filed herein on August 12, 1954, and the time for filing the record on appeal and docketing the appeal will, without extension by order of this court, expire on September 21, 1954;

Now, Therefore, it is stipulated between the attorneys for the respective parties hereto that plaintiff be given up to and including November 1, 1954, to file the record on appeal and docket the same in the United States Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered herein.

Dated at Juneau, Alaska, this 11th day of September, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants, Halferty Canneries, Inc.,  
and D. K. MacDonald & Co.

J. GERALD WILLIAMS,  
Attorney General of Alaska;

By /s/ J. GERALD WILLIAMS,  
Attorney for Defendant,  
Alaska Industrial Board.

[Endorsed]: Filed in open Court September 20,  
1954.

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[Title of District Court and Cause.]

### ORDER

Upon consideration of the stipulation, dated September 11, 1954, between the attorneys for the respective parties to this action, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in the above cause is extended to and including November 1, 1954.

Dated at Juneau, Alaska, this 20th day of September, 1954.

/s/ GEORGE W. FOLTA,  
District Judge. .

[Endorsed]: Filed in open Court September 20,  
1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON BY PLAINTIFF

Plaintiff proposes on his appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$3.88 per day.

This was error because the evidence clearly showed that plaintiff's "average daily wage earning capacity," within the meaning of the "temporary disability" clause of Section 43-3-1 ACLA 1949, was greater than \$3.88 per day.

2. The court erred in entering its decree in favor of the defendants and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to defendants against plaintiff for the former's costs and attorneys' fees.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 20, 1954.



[Title of District Court and Cause.]

### STIPULATION RE PRINTING OF RECORD

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that in printing the record to be used in the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of such titles on all papers used as part of such record the words: "title of district court and cause"; and that all endorsement on all papers used as part of such record may be omitted except the clerk's filing marks and admissions of service.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General for Alaska;

By /s/ EDWARD A. MERDES,  
Attorney for Defendant-Appellee, Alaska  
Industrial Board.

[Endorsed]: Filed October 20, 1954.



[Title of District Court and Cause.]

STIPULATION AS TO CONTENTS OF  
RECORD ON APPEAL

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that the transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above cause, shall comprise the following and only the following:

1. The Alaska Industrial Board's award of January 8, 1954.
2. Findings of fact and conclusions of law.
3. Decree.
4. Notice of appeal and cost bond on appeal.
5. Statement of points relied upon by appellant.
6. Stipulation re printing of record.
7. Stipulation and order re extension of time for filing record on appeal.
8. Agreed statement as record on appeal.
9. This stipulation.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General for Alaska.

By /s/ EDWARD A. MERDES,  
Attorney for Defendant-Appellee, Alaska Industrial  
Board.

[Endorsed]: Filed October 20, 1954.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 27th day of October, 1954.

J. W. LEIVERS,  
Clerk of the District Court.

By /s/ P. D. E. McIVER,  
Chief Deputy.

[Endorsed]: No. 14567. United States Court of Appeals for the Ninth Circuit. John Giske, Appellant, vs. Alaska Industrial Board, Halferty Canneries, Inc., and D. K. MacDonald & Co., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 28, 1954.

/s/PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14567

JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY  
CANNERIES, INC., and D. K. MacDONALD  
& CO.,

Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF PARTS OF REC-  
ORD TO BE PRINTED

Appellant above named adopts the "statement of points to be relied upon by plaintiff," filed with the Clerk of the District Court, as his statement of points to be relied upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record as filed and certified be printed.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 1, 1954.